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Public Prosecutor v Yap Kim Wang

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–290–10 OF 2014
MOHTARUDIN BAKI, HAMID SULTAN AND AHMADI ASNAWI JJCA
19 FEBRUARY 2016

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Criminal Procedure — Appeal — Appeal against conviction — Possession of drugs — Drugs, access card and keys found in bag and apartment — Key opened door to apartment where drugs and paraphernalia of drug-making were found — Whether drugs, access card and keys belonged to respondent — Whether respondent had sole access to apartment — Whether prosecution successfully established prima facie case — Whether defence created reasonable doubt on prosecution's case — Penal Code

D

Acting upon information that a certain drug trafficking activity would take place, police officer PW5 together with his team proceeded to an apartment ('the apartment') to carry out surveillance. The respondent was seen coming out of the lift of the apartment and appeared suspicious. PW5 stopped the respondent and conducted a body search on the latter but nothing incriminating was found. In a sling bag, one translucent plastic packet containing substance suspected to be drugs, a purse with the respondent's identification card and a key to a house located at the fifth floor of the apartment ('the said premises'). PW5 and his team headed to the fifth floor with the respondent and upon the door of the said premises with the key. Various kind of substance suspected to be drugs and paraphernalia believed to be connected with drug manufacturing was found on a table in a room. The investigating officer ('PW7') visited the crime scene on the same day and took possession, inter alia, a pair of jeans, sandals and an access card to gain entry into the apartment. The substances seized were confirmed by the chemist ('PW4') to be various drugs. At the High Court, the respondent faced seven drug-related charges. In the respondent's defence, he was a debt collector and staying somewhere else. The respondent would go to the apartment to meet his boss ('DW2') to pass collected sums. DW2 gave him RM50 to apply for the access card from the apartment's management in order to have access into the apartment. DW2 also gave him the key to the door of the said premises. According to the respondent, on the day of his arrest, he had gone to the said premises to meet DW2 but DW2 was not in. He averred that the pair of sandals and jeans were not his and claimed that he had never seen the said articles before. The respondent later changed his testimony and said that he was arrested while he was inside DW2's motorcar. Meanwhile, DW2 testified that

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he used to meet the respondent quite often at the said premises. The said premises belonged to his friend and had sublet the same to another friend of his. However, DW2 did not know the name of this friend of his. DW2 did not testify that he was the respondent's boss and had denied giving RM50 to the respondent to apply for the access card to gain entry into the said apartment. DW2 also did not say anything about the motorcar or that he was the owner of the said motorcar. At the conclusion of the trial, the trial judge found that the respondent had raised a reasonable doubt upon the prosecution's case on account that the respondent was not the tenant nor the occupier of the said premises. The trial judge ordered the acquittal and discharge of the respondent of second and seventh charges at the end of the defence's case. Hence, the present appeal. The issues raised was whether the trial judge erred in law and in fact when he found that the respondent had raised a reasonable doubt upon the prosecution's case grounded upon the premise that the respondent was not the tenant nor occupier of the said premises.

Held, allowing appellant's appeal in respect of orders of acquittal and discharge of second and seventh charges and finding respondent guilty and convicted for all charges; setting aside orders of High Court:

(1) **(per Ahmadi Asnawi JCA, majority)** DW2's testimony was unbelievably incredible. He had rented the said premises and paid RM800 per month but did not occupy the said premises. Instead he had allowed his friend to stay in the said premises. In the next breath he said that he had sublet the premises to his friend but incredibly or perhaps conveniently could not remember his friend's name. There were no details regarding the amount of rentals paid to him by his friend nor the commencement and duration of the subtenancy. Given that entry into the apartment by owners, tenants or occupiers alike was by way of an access card, there was no evidence from DW2 that he had given an access card to his friend nor evidence that his friend did in fact apply for an access card. DW2 also failed to explain his rather strange behaviour on why he had rented the said premises but did not reside therein (see para 32).

(2) **(per Ahmadi Asnawi JCA, majority)** It was apparent that DW2 and the respondent had contradicted each other on core issues of the defence mounted by the respondent. There was ample evidence to indicate that the respondent was occupying the said premises and was in full control, management and have exclusive use and access of the premises. The evidence is uncontroverted that the key to the premises was found in the sling bag, slung over the respondent's shoulders as testified by PW5. There is no reason to disbelieve PW5's testimony relating to the seizure of the said key. Equally, the respondent did not seriously challenge the seizure of the said key in the manner testified by PW5. The discovery of the drugs and poisons in the unlocked room inside the premises which

was under the control, management and exclusive use of the respondent verily fastened the respondent with the possession of the said drugs and poisons (see paras 33, 39–40 & 54).

(3) **(per Hamid Sultan JCA, dissenting)** The prosecution knew others had access to the said premise but did not do anything about it to deal with the issue of actus rea as well as mens rea to satisfy them beyond reasonable doubt. It was incumbent for the prosecution to close the gap and/or provide convincing evidence and/or investigation report to say why they were not able to produce the missing link. The law does not permit the prosecution to rest on the laurels when dealing with issues relating to actus and mens rea (see para 9).

(4) **(per Hamid Sultan JCA, dissenting)** The trial judge who had the benefit of demeanour of witness had considered the evidence in totality and had come to the conclusion that the prosecution had failed to prove the case according to the law. The appeal court is obliged to give deference to trial court decision of an acquittal unless the court had applied wrong principle of law. The prosecution in this case had not shown that the trial judge had applied the law wrongly and/or was not according to established principle relating to drug cases. This was not a fit and proper case to allow appeal on established principles (see para 10).

[Bahasa Malaysia summary

Bertindak atas maklumat bahawa kegiatan pengedaran dadah tertentu akan berlaku, pegawai polis PW5 bersama pasukannya telah pergi ke sebuah apartmen ('pangsapuri tersebut') untuk menjalankan pengawasan. Responden telah dilihat keluar dari lif pangsapuri tersebut dan kelihatan mencurigakan. PW5 telah menahan responden dan melakukan carian badan ke atasnya tetapi tiada apa-apa yang salah dijumpai. Dalam satu beg galas, bungkusan plastik yang lut sinar mengandungi bahan disyaki dadah, satu dompet dengan kad pengenalan responden dan kunci kepada rumah yang terletak di tingkat lima pangsapuri tersebut ('premis tersebut'). PW5 dan pasukannya menuju ke tingkat lima dengan responden dan membuka pintu premis tersebut dengan kunci itu. Pelbagai jenis bahan yang disyaki dadah dan perlengkapan dipercayai berkait dengan pembuatan dadah dijumpai atas meja dalam sebuah bilik. Pegawai penyiasat ('PW7') telah melawat tempat kejadian jenayah itu pada hari yang sama dan mengambil, antara lain, sepasang seluar jeans, selipar dan kad akses untuk memasuki pangsapuri tersebut. Bahan-bahan yang dirampas telah disahkan oleh ahli kimia ('PW4') sebagai pelbagai jenis dadah. Di Mahkamah Tinggi, responden berhadapan dengan tujuh pertuduhan berkaitan dadah. Dalam pembelaan responden, dia adalah pengutip hutang dan tinggal di tempat lain. Responden akan pergi ke pangsapuri tersebut untuk berjumpa ketuanya ('DW2') untuk menyerahkan jumlah yang dikutip. DW2 telah memberinya RM50 untuk memohon kad akses dari pihak pengurusan pangsapuri tersebut bagi tujuan mendapat akses ke dalam pangsapuri tersebut.

DW2 juga telah memberinya kunci kepada pintu premis tersebut. Menurut responden, pada hari tangkapannya, dia telah pergi ke premis tersebut untuk berjumpa dengan DW2 tetapi DW2 tiada. Dia menegaskan bahawa sepasang selipar dan seluar jeans itu bukan kepunyaannya dan mendakwa bahawa dia tidak pernah melihat barangan tersebut sebelum ini. Responden kemudian telah menukar keterangannya dan menyatakan bahawa dia telah ditangkap semasa dia di dalam kereta DW2. Manakala, DW2 memberi keterangan bahawa dia biasanya sering berjumpa dengan responden di premis tersebut. Premis tersebut adalah milik kawannya dan telah menyewanya kepada kawannya yang lain. Walau bagaimanapun, DW2 tidak tahu nama kawannya itu. DW2 tidak memberi keterangan bahawa dia adalah ketua responden dan menafikan telah memberi RM50 kepada responden untuk memohon kad akses agar boleh masuk ke dalam pangsapuri tersebut. DW2 juga tidak mengatakan apa-apa tentang kereta atau bahawa dia pemilik kereta tersebut. Di penutup perbicaraan, hakim perbicaraan mendapati responden telah menimbulkan keraguan munasabah atas kes pendakwaan berdasarkan bahawa responden bukan penyewa atau penghuni premis tersebut. Hakim perbicaraan memerintahkan pelepasan dan pembebasan responden untuk pertuduhan-pertuduhan kedua dan ketujuh di akhir kes pembelaan. Justeru, rayuan ini. Isu-isu yang timbul adalah sama ada hakim perbicaraan terkhilaf dari segi undang-undang apabila beliau mendapati bahawa responden telah menimbulkan keraguan munasabah ke atas kes pendakwaan berdasarkan premis tersebut bahawa responden bukan penyewa ataupun penghuni premis tersebut.

Diputuskan, membenarkan rayuan perayu berkaitan perintah-perintah pelepasan dan pembebasan pertuduhan-pertuduhan kedua dan ketujuh dan mendapati responden bersalah dan disabitkan untuk kesemua pertuduhan; mengetepikan perintah-perintah Mahkamah Tinggi:

(1) **(oleh Ahmadi Asnawi HMR, majoriti)** Keterangan DW2 agak hebat. Dia telah menyewa premis tersebut dan membayar RM800 sebulan tetapi tidak menghuni premis tersebut. Sebaliknya dia telah membenarkan kawannya tinggal di premis tersebut. Kemudian dia mengatakan yang dia menyewa premis tersebut kepada kawannya tetapi agak pelik atau dengan kebetulannya yang dia tidak ingat nama kawannya itu. Tiada butir-butir tentang jumlah sewa yang dibayar kepadanya oleh kawannya atapun bila mula dan tempoh sewa kecil itu. Berdasarkan kemasukan ke dalam pangsapuri tersebut oleh pemilik, penyewa atau penghuni semuanya adalah melalui kad akses, tiada keterangan daripada DW2 bahawa dia telah memberikan kad akses kepada kawannya atau keterangan bahawa kawannya sebenarnya telah memohon untuk kad akses. DW2 juga gagal menjelaskan kelakuan agak peliknya tentang kenapa dia telah menyewa premis tersebut tetapi tidak tinggal di situ (lihat perenggan 32).

(2) **(oleh Ahmadi Asnawi HMR, majoriti)** Ia jelas bahawa DW2 dan responden telah bercanggah antara satu sama lain berhubung isu-isu penting pembelaan yang dikemukakan oleh responden. Terdapat keterangan mencukupi untuk menunjukkan bahawa responden menghuni premis tersebut dan dalam kawalan, pengurusan penuh dan mempunyai penggunaan dan akses eksklusif kepada premis tersebut. Keterangan itu tidak dipertikaikan bahawa kunci kepada premis tersebut dijumpai dalam beg galas, yang disilang atas bahu responden sepertimana diberi keterangan oleh PW5. Tiada sebab untuk tidak mempercayai keterangan PW5 berkaitan rampasan kunci tersebut. Begitu juga, responden tidak mencabar dengan serius rampasan kunci tersebut sepertimana diberi keterangan oleh PW5. Penemuan dadah dan racun dalam bilik tidak berkunci di dalam premis tersebut yang mana adalah di bawah kawalan, pengurusan dan penggunaan eksklusif responden mengesahkan dengan kukuh bahawa responden mempunyai milikan ke atas dadah dan racun tersebut (lihat perenggan 33, 39–40 & 54).

(3) **(oleh Hamid Sultan HMR, menentang)** Pendakwaan mengetahui orang lain mempunyai akses ke premis tersebut tetapi tidak berbuat apa-apa tentangnya untuk menangani iaitu actus rea dan juga mens rea untuk memenuhi keraguan munasabah. Ia wajib untuk pendakwaan menutup jurang dan atau memberikan keterangan dan atau laporan siasatan yang meyakinkan untuk mengatakan kenapa mereka tidak boleh mengemukakan rangkai yang hilang itu. Undang-undang tidak membenarkan pendakwaan bergantung kepada lompong itu apabila menangani isu-isu berkaitan actus rea dan mens rea (lihat perenggan 9).

(4) **(oleh Hamid Sultan HMR, menentang)** Hakim perbicaraan yang mempunyai kelebihan mengetahui sikap saksi telah mempertimbangkan keterangan secara keseluruhan dan tiba kepada kesimpulan bahawa pendakwaan telah gagal membuktikan kes menurut undang-undang. Mahkamah Rayuan bertanggungjawab memberi penghormatan kepada keputusan mahkamah perbicaraan tentang pelepasan itu kecuali mahkamah menggunakan prinsip undang-undang yang salah. Pendakwaan dalam kes ini tidak menunjukkan bahawa hakim perbicaraan telah menggunakan undang-undang dengan salah dan atau tidak menurut prinsip mapan berkaitan kes-kes dadah. Ini bukan kes yang sesuai dan wajar untuk membenarkan rayuan atas prinsip-prinsip mapan (lihat perenggan 10).]

Notes

For cases on appeal against conviction, see 5(1) *Mallal's Digest* (5the Ed, 2015) paras 229–300.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Phrueksa Taemchim (Thailand) v PP [2013] 6 MLJ 808, CA (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
PP v Ling Leh Hoe [2015] MLJU 1006; [2015] 4 CLJ 869, CA (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)
Timhar Jimdani Ong & Anor v PP [2010] 1 MLJ 775; [2010] 3 CLJ 938, CA (refd)

Legislation referred to

Criminal Procedure Code s 112
Dangerous Drugs Act 1952 s 37(da), 39A(2), 39B(2), First Schedule
Evidence Act 1950 ss 32(1)(i), 114(e)
Federal Constitution art 5
Poisons Act 1952 First Schedule

Appeal from: Criminal Trial Nos 45A-02–02 of 2012, 45A-02–03 of 2012, 45A-02–04 of 2012 and 45A-02–06 of 2012 (High Court, Muar)

Tengku Amir Zaki (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Muhammad Fadhli Mat Sutris (Fadhli Sutris & Badrul Munir) for the respondent.

Hamid Sultan JCA (delivering dissenting judgment of the court):

[1] The prosecution appeal against the secnd to seventh charge came up for hearing on 18 August 2015 and upon hearing, we reserved judgment.

[2] My learned brothers Mohtarudin bin Baki JCA and Ahmadi bin Haji Asnawi JCA by majority have allowed the appeal. I have the benefit of reading the judgment. After much consideration, I take the view that the appeal must be dismissed. I will now give my reasons.

BRIEF FACTS

[3] The respondent was arrested with a sling bag which contained drugs, which is related to the first charge (alternative). The learned trial judge only convicted him for that charge and for other charges he was acquitted and discharged.

[4] Upon the arrest of the respondent, the prosecution came to know that the respondent was having keys to the fifth floor of a house at the said

pangsapuri. The police party took him to the house and recovered the drugs which were the subject matter of the seven charges which I have set out below.

[5] What is important to note is that the prosecution has failed to connect him to the drugs except for the first charge. It is also not in dispute that others also had excess to the house. The facts will also dictate that a flat (*pangsapuri*) of that nature is likely to have more than one occupant and the prosecution evidence on investigative evidence as to common sense approach to connect the accused to the charge was clearly lacking. In consequence, the learned trial judge accepted the respondent's evidence which was not materially challenged by the prosecution. The relevant part of the evidence reads as follows:

27. Seramai 2 orang saksi telah dipanggil bagi kes pembelaan. OKT(SD1) di dalam keterangannya menyatakan ia hendak keluar daripada Pangsapuri Maharani City Tower apabila ditahan oleh pasukan polis di kawasan 'guard house', la ditangkap oleh 4 orang dan berasa takut dirompak kerana ia bekerja sebagai along. OKT ketika ia berada di tempat kejadian untuk menyerahkan wang kepada bosnya iaitu Sia Lee Kiong (SD2) dan telah diberikan kad laluan (access card). OKT hanya pergi ke rumah No 5-3 hanya apabila bosnya ada di rumah. OKT menafikan pernah melihat selipar dan jeans yang dikatakan disimpan di rumah tersebut.

28. SD2 mengakui ia mengenali OKT. SD2 mengakui ia selalu bertemu dengan OKT di apartment tersebut yang mana menurut SD2, adalah kepunyaan kawannya. SD2 tidak duduk di apartment tersebut dan telah menyerahkan kepada seorang kawan yang tidak diingati namanya.

29. Berkaitan dengan keterangan OKT (SD1) akan penafian beliau akan beg silang yang dirampas daripada tubuh badan OKT semasa serbuan, dan juga kereta Honda Odessy, ianya tidak pernah dikemukakan semasa kes pendakwaan. OKT dikatakan telah ditahan di tempat bertanda 'X' di P6. Tiada apa-apa laporan polis yang dibuat oleh OKT akan hal ini dan ini juga tidak ditimbulkan oleh peguam OKT semasa kes pendakwaan. Dengan itu, keterangan OKT ini dalah bersifat fikir kemudian atau 'after thought'.

30. OKT mengakui ia mempunyai kad laluan dan kunci yang diberikan oleh SD1. OKT juga mengakui bahawa ia masih boleh memasuki kawasan pangsapuri tersebut dan memasuki rumah No 5-3 pada setiap masa apabila SD2 ada di sana. Oleh itu, OKT masih boleh masuk ke kawasan pangsapuri tanpa adanya access card dan kunci kerana SD2 akan berada di sana. Malahan SD2 sendiri menafikan ia ada meminta OKT memohon satu akses kad tersebut.

31. Berkenaan dengan keterangan SD2 akan terdapatnya penyewa lain iaitu kawan SD2, mahkamah telah merujuk semula kepada keterangan SP1, Ng So Muo @ Ng Sui Mui, SP1 mengesahkan terdapatnya satu Tenancy Agreement di atnara SP1 dengan Tay Boon Chuan (P8) di mana Tay Boon Chuan telah menyewa pangsapuri tersebut bagi tempoh 3 bulan sahaja.

Sewaan bagi bulan Ogos dibayar sebagai komisyen kepada agen manakala sewaan bagi bulan September dan Oktober dibank in oleh saudara kepada penyewa.

32. SP1 juga menyatakan anak saudara penyewa ada menelefon SP1 dan SP1 ada menulis nombor telefon di bawah nama Ah Hong dan tercatat sebagai 017-6796390(Ah Long, nephew).

33. Keterangan SP1 ini adalah sama dengan keterangan OKT bahawa SD2 adalah Ah Long yang dimaksudkan.

34. Dengan itu, jelas bahawa apartment tersebut adalah disewa dan dihuni oleh SD2 sebenarnya sepertimana yang disahkan oleh SP1, iaitu disewa oleh nephew Tay Boon Chua. Pihak pendakwaan anihnya tidak memanggil Tay Boon Chua ke mahkamah dan dengan itu, inferen di bawah Seksyen 114(g) Akta Keterangan boleh dibuat.

35. Dengan pengakuan oleh SD2 dan disokong oleh SP1, jelas OKT bukanlah penyewa atau penghuni apartment tersebut dan catitan di P8 Nota Keterangan SP1 sendiri mengakui apartment tersebut disewa oleh seorang ah long, iaitu anak saudara kepada Tay Boon Chuan.

36. Dengan itu, mahkamah memutuskan keterangan SP1, SD1 dan juga SD2 telah menimbulkan keraguan yang munasabah ke atas kes pendakwaan, iaitu OKT bukanlah penyewa atau penghuni apartment tersebut.

[6] All the seven charges read as follows:

Pertuduhan Pertama:
Bahawa kamu bersama-sama pada 11hb Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan dadah berbahaya iaitu methamphetamine seberat 40.66 gram. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

Pertuduhan (Pindaan):
Bahawa kamu bersama-sama pada 11hb Oktober 2011 jam lebih kurang 1.00 pagi di perkarangan Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan dadah berbahaya iaitu methamphetamine seberat 40.66 gram. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

Pertuduhan Kedua:
Bahawa kamu bersama-sama pada 11hb Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati memperedarkan dadah berbahaya iaitu 30.56 gram (campuran 4.36 gram heroin dan 26.20 gram monoacetylemorphines). Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Pertuduhan Ketiga:
Bahawa kamu bersama-sama pada 11hb Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan kamu dadah berbahaya iaitu methamphetamine seberat 14.08 gram. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama.

Pertuduhan Keempat:
Bahawa kamu bersama-sama pada 11hb Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan kamu dadah berbahaya iaitu 10.79 gram (campuran 8.24 gram heroin dan 2.55 gram monoacetylemorphines). Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

Pertuduhan Kelima:
Bahawa kamu bersama-sama pada 11hb Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan kamu dadah berbahaya iaitu ketamine seberat 2.23 gram. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama.

Pertuduhan Keenam:
Bahawa kamu bersama-sama pada 11hb Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan kamu dadah berbahaya iaitu 57.35 gram pseudoephredine, dengan itu kamu telah melakukan kesalahan di bawah seksyen 30(3) Akta Racun 1952 (disemak 1989) dan boleh dihukum di bawah Seksyen 30(5) Akta yang sama.

Pertuduhan Ketujuh:
Bahawa kamu bersama-sama pada 11hb Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah memiliki 403.55 gram lignocaine, dengan itu kamu telah melakukan kesalahan di bawah seksyen 30(3) Akta Racun 1952 (disemak 1989) dan boleh dihukum di bawah Seksyen 30(3) Akta yang sama.

[7] The petition of appeal reads as follows:

1. Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila melepaskan dan membebaskan Responden daripada kesemua pertuduhan sedangkan terdapat keterangan yang mencukupi untuk mensabitkan Responden.

2. Yang Arif Hakim telah khilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Responden telah berjaya membangkitkan keraguan munasabah terhadap kes pendakwaan.

3. Yang Arif Hakim telah terkhilaf dari segi fakta dan undangundang apabila gagal mempertimbangkan keseluruhan keterangan pihak pendakwaan yang sememangnya telahpun berjaya membuktikan kesemua intipati pertuduhan bagi setiap kesalahan terhadap Responden.

4. Yang Arif Hakim telah terkhilaf dari segi fakta dan undangundang apabila gagal mengambil kira rakaman percakapan Sabar Menanti bin Beran, P34 sedangkan rakaman percakapan itu menunjukkan bahawa Responden menghuni rumah yang beralamat di No 5-3, Pangsapuri Maharani City Tower.

5. Yang Arif Hakim telah khilaf dari segi fakta dan undang-undang apabila gagal menimbangkan keterangan-keterangan berikut yang menunjukkan Responden mempunyai jagaan, kawalan dan pengetahuan terhadap dadah yang dirampas seperti berikut:

   (a) Responden kelihatan gelisah ketika pihak polis memperkenalkan diri;

   (b) Responden mempunyai kunci rumah no 5-3, Pangsapuri Maharani City Tower yang mana dadah dijumpai; dan

   (c) Seluar dan selipar yang dijumpai di rumah tersebut telah diacupakai kepada Responden dan ianya berpadanan dengan Responden.

6. Yang Arif Hakim telah khilaf dari segi fakta dan undang-undang apabila gagal mengambilkira percanggahan keterangan di antara SD1 dan SD2,

7. Yang Arif Hakim telah khilaf dari segi fakta dan undang-undang apabila memutuskan kegagalan memanggil penama Tay Boon Chua menyebabkan satu inferen di bawah seksyen 114 (g) Akta Keterangan 1950 terhadap kes pihak pendakwaan.

8. Yang Arif Hakim telah khilaf dari segi fakta dan undang-undang apabila membuat dapatan fakta bahawa apartment tersebut disewa oleh seorang 'ah long', sedangkan tiada keterangan seumpama itu dikemukakan.

9. Yang Arif Hakim telah khilaf dari segi fakta dan undang-undang apabila memutuskan Responden bukanlah penghuni atau penyewa tersebut.

[8] I have read the appeal record and the submissions of the parties inclusive of the submission of the respondent in respect of the cross-appeal. I take the view that there is no appealable error and it is a safe decision. My reasons, inter alia, are as follows:

(a) It is trite that court does not convict and sentence a person to death when physically the prosecution is not able to link the accused. Physical link will consist of credible evidence of finger prints, DNA etc; which positively identifies the accused with the drugs. Circumstantial evidence which are convoluted and stands on the evidence of surmise, conjecture and belief led by prosecution are not sufficient to satisfy the beyond reasonable doubt test imposed by law on the prosecution. In addition art 5 of the Federal Constitution does not permit a person to be hanged

purely on circumstantial evidence, conjecture and belief when the prosecution had not been able to physically link the accused to the drugs. Support for the proposition is found in number of cases where the courts have said what I have adumbrated in different words. I have also dealt on such issues in a number of judgments. It is unnecessary to deal with all the cases save to repeat what I have said in the case of *Phrueksa Taemchim (Thailand) v Public Prosecutor* [2013] 6 MLJ 808 which read as follows:

It is important to observe that s 37(d) uses the phrase 'deemed to have been in possession' and does not mention trafficking. And s 37(da) uses the phrase 'found in possession' (actual possession), and mentions trafficking. That is to say that s 37(d) may become operational the moment custody and control of the drugs is established; though case laws have placed caveat to say without proof of knowledge it is insufficient to apply the presumption of possession. In addition courts have asserted that knowledge has to be proven by direct or circumstantial evidence. And a further caveat to say that mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking. For example, in a case where husband and wife are staying in the same house and the husband with the knowledge of the wife in a locked room to the exclusion of the wife is involved in trafficking of drugs; based on the Federal Court decision of *Ibrahim Mohamad v Public Prosecutor* [2011] 4 CLJ 143, it is unlikely that a charge for trafficking or possession can succeed against the wife at the prosecution stage or at least at the defence stage based on her story of non-involvement and the fact the husband is the trafficker, and she has no custody or control. On the assumption she says that she has access to the room, she may be liable only for possession if the court accepts the story the husband is the trafficker based on the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 and *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538. *Radhi*'s case was followed in the case of Sochima where Justice Gopal Sri Ram JCA (as he then was) accepted the proposition that in law a person in possession of a dangerous drug would be entitled to an acquittal on a charge of trafficking by demonstrating either on a balance of probabilities or by raising a reasonable doubt that there is another who is the real trafficker. And if the wife is called to enter defence for possession, and if she is able to convince the court she has no 'animus possidendi', she will be entitled to an acquittal (see *Chan Pean Lean v Public Prosecutor* [1956] 1 MLJ 237).

[9] In the instant case the prosecution knew others have access to the premise but did not do anything about it to deal with the issue of actus as well as mens rea to satisfy the beyond reasonable doubt. When the prosecution's evidence is lacking in common sense approach to evidence as to the issue of actus and mens rea, the law does not permit the trial court to convict. It is incumbent for prosecution to close the gap and/or provide convincing evidence and/or investigation report to say why they were not able to produce the missing link. The law does not permit the prosecution to rest on the laurels when dealing with issues relating to actus and mens rea. Section 114(e) of the Evidence Act 1950 will not assist the prosecution to fill the gap in prosecutorial investigation relating to circumstantial evidence in the form of surmise, conjecture, opinion

etc. In addition, s 114(g) will assist the defence to rebut the charge if there is clear evidence that others have access to the premise and the prosecution knew that but did nothing to lead evidence to show why they could not produce the missing link. When the prosecution knows the fact that others have access, the issue of 'Alcontara Notice' does not arise at all.

[10] In the instant case, the learned trial judge who had the benefit of demeanour of witness had considered the evidence in totality and had come to the conclusion that the prosecution had failed to prove the case according to the law. The appeal court is obliged to give deference to trial court decision of an acquittal unless the court has applied wrong principle of law. The position in England in jury trial is that the jury is the final arbiter of facts (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281). The prosecution in this case has not shown that the learned trial judge had applied the law wrongly and/or was not according to established principle relating to drug cases. Merely complaining on finding of facts and asking the appellate court to accept the version of the prosecution case does not comply with the strict jurisprudence relating to drug cases which attracts death penalty.

I do not think that it is a fit and proper case to allow the appeal on established principles. I will dismiss the appeal.

I hereby order so.

Ahmadi Asnawi JCA (delivering majority judgment of the court):

[11] The respondent before the High Court in Muar, was levelled with the following charges:

Pertuduhan Pertama:

> Bahawa kamu bersama-sama pada 11hb. Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan dadah berbahaya iaitu methamphetamine seberat 40.66 gram. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

Pertuduhan (Pindaan):

> Bahawa kamu bersama-sama pada 11hb. Oktober 2011 jam lebih kurang 1.00 pagi di perkarangan Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan dadah berbahaya iaitu methamphetamine seberat 40.66 gram. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952dan boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

Pertuduhan Kedua:

Bahawa kamu bersama-sama pada 11hb. Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati memperedarkan dadah berbahaya iaitu 30.56 gram (campuran 4.36 gram heroin dan 26.20 gram monoacetylemorphines). Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Pertuduhan Ketiga:

Bahawa kamu bersama-sama pada 11hb. Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan kamu dadah berbahaya iaitu methamphetamine seberat 14.08 gram. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta Dadah Berbahaya, 1952 Akta yang sama.

Pertuduhan Keempat:

Bahawa kamu bersama-sama pada 11hb. Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan kamu dadah berbahaya iaitu 10.79 gram (campuran 8.24 gram heroin dan 2.55 gram monoacetylemorphines). Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952dan boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

Pertuduhan Kelima:

Bahawa kamu bersama-sama pada 11hb. Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan kamu dadah berbahaya iaitu ketamine seberat 2.23 gram. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta Dadah Berbahaya, 1952 Akta yang sama.

Pertuduhan Keenam:

Bahawa kamu bersama-sama pada 11hb. Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim, telah didapati dalam milikan kamu dadah berbahaya iaitu 57.35 gram pseudoephredine, dengan itu kamu telah melakukan kesalahan di bawah seksyen 30(3) Akta Racun 1952 (disemak 1989) dan boleh dihukum di bawah Seksyen 30(5) Akta yang sama.

Pertuduhan Ketujuh:

Bahawa kamu bersama-sama pada 11hb. Oktober 2011 jam lebih kurang 1.00 pagi di 5-3, Pangsapuri Maharani City Tower, Jalan Sulaiman, di dalam Daerah

Muar, di dalam Negeri Johor Darul Takzim, telah memiliki 403.55 gram lignocaine, dengan itu kamu telah melakukan kesalahan di bawah seksyen 30(3) Akta Racun 1952 (disemak 1989) dan boleh dihukum di bawah Seksyen 30(3) Akta yang sama.

[12] The respondent was found guilty and convicted of the first (alternative) charge. The honourable public prosecutor's appeal was anchored upon the orders of discharged and acquittal of charges No 2 to No 7 enumerated above at the end of the defence's case. We heard the appeal on 18 August 2015 and thereafter reserved judgment. We now give our decision.

THE CASE FOR THE PROSECUTION

[13] Acting upon information received relating to a drug trafficking activity, PW5 (ASP Tan Yong Wee, who was then attached to Jabatan Siasatan Jenayah Narkotik, Ibu Pejabat Polis Kontingen, Johor Bharu) together with his team consisting of four other police officers, went to Pangsapuri Maharani City Tower, Jalan Sulaiman, Muar, Johor ('the *pangsapuri*'). He arrived at the premises at about 12.30am on 11 October 2011. Thereafter he mounted a surveillance of the premises and its vicinity.

[14] At about 1am PW5 saw the respondent coming out of the lift of the *pangsapuri*. He appeared suspicious in his mannerism.

[15] PW5 proceeded to stop the respondent. He identified himself as a police officer. A body search was done on the person of the respondent but nothing incriminating though was found on his person.

[16] The respondent however, had a sling bag (exh P13A) slung over his shoulders. PW5 then proceeded to seize the said sling bag. He found one translucent plastic packet containing substance suspected to be drugs (this substance, exh P13B, formed the subject matter of the first charge), a purse (exh P29) containing the respondent's NRIC (exh P13Y) and a key with a tag (exh P41) bearing the No 5-3.

[17] Upon questioning, the respondent revealed that the key was the key to house/premises No 5-3, located at the fifth floor of the said *pangsapuri* ('the said premises').

[18] PW5 and his team then took the respondent to the said premises at the fifth floor. He managed to open the door to premises No 5-3 by using the said key. PW5 and his team together with the respondent proceeded to enter the premises.

[19] There were three rooms in the premise. PW5 and his team then entered into the room in the middle. In the sketch plan (exh P31) at p 278 of *Jld* 4, *rekod rayuan* ('RR'), the said room is indicated as room No 2. The door into this room was not locked. There was a table in the room. PW5 found various substance suspected to be drugs of various kinds and paraphernalia believed to be connected with drug manufacturing on the table and its vicinity.

[20] PW5 had these incriminating exhibits seized. The full list of his seizure is indicated in the *borang bongkar* (exh P18) at pp 270–273 of *Jld* 4, RR. The items seized were shown in the photographs, exh P7 (1–6) at pp 248–251 of *Jld* 4, RR.

[21] The doors to the two other rooms were also not locked. PW5 found the two rooms empty.

[22] The respondent together with the incriminating exhibits were handed over to the investigating officer, PW7 (Insp Mohd Suhairie bin Seman), at about 6.10am on the same day (11 October 2011) vide *borang serah menyerah barang kes* (exh P19), as seen at pp 274–275 of *Jld* 4, RR.

[23] PW7 visited the crime scene at about 12.15pm on the same day. He took possession of a pair of jeans (exh P37) and a pair of sandals (exh P38) from the said premises. The exhibits were as shown in the photographs, exh P7 (5 and 6) at pp 252–253 of *Jld* 4, RR. PW7 testified that the jeans and sandals fitted nicely on the person of the respondent as shown in the photographs, exh P32 (1–5) at pp 280–284 of *Jld* 4, RR. PW7 also found an access card (exh P39) to gain entry into the *pangsapuri*. Otherwise the premises is empty with no signs of being occupied.

[24] PW7 sent the said exhibits suspected to be drugs seized from the table in room No 2 in the said premises to the chemist, PW4 (Soupy bin Daud), on 17 October 2011 for analysis. PW4 found the same to be hard drugs of various kinds ie heroin, monoactylmorphines, methamphetamine and ketamine, all listed in the First Schedule of the Dangerous Drugs Act 1952. There were also pseudoephredine and lignocaine, both listed as poisons in the First Schedule of the Poisons Act 1952. These drugs and poisons as analysed and found by PW4 formed the subject matter of charges No 2 to No 7 levelled against the respondent. PW4's report (exh P17) is indicated at pp 266 of *Jld* 4, RR.

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

[25] The learned trial judge ('the learned judge') found that the prosecution had established a prima facie in respect of all the charges proffered against the respondent. The respondent was ordered to enter his defence.

THE CASE FOR THE DEFENCE

[26] The respondent gave evidence on oath. He posited that:

(a) he worked as a debt collector (*along*). DW2 (Sia Lee Kiong) was his 'boss'. He stayed elsewhere and would go to the said premises at Pangsapuri Maharani City Tower to meet DW2 to pass the sums he had collected from DW2's debtors. He would come to the said premises only if DW2 had called him to come and only if DW2 was in the said premises;

(b) DW2 gave him RM50 to apply for the access card from the *pangsapuri*'s management in order to have access into the *pangsapuri*. In addition, DW2 also gave him the key to the door of the said premises to gain entry;

(c) on 11 October 2011 at about 1am he was arrested by the police within the vicinity of the guard house while on his way out of the *pangsapuri*. Earlier, he had gone up to the said premises to meet DW2 to pass the sums he had collected to DW2 but DW2 was not in;

(d) he was scared when he was accosted by the police who were all dressed in civilian clothings. He thought they wanted to rob him as he worked as an Along;

(e) he averred that the pair of sandals and jeans were not his and claimed that he had never seen the said articles before. He also claimed that the sandals and jeans were too big (*longgar*) for him when fitting tests of the same were done on his person;

(f) later the respondent changed his testimony. Now he said that he was arrested while he was inside a Honda Odessey motorcar belonging to DW2. The said motorcar was seized by the police in Johor Bahru;

(g) DW2 meanwhile testified that he had known the respondent for quite a while and used to meet the respondent quite often at the said premises. The apartment belonged to his friend and he had rented the same and paid RM800 per month as the rentals for the said apartment. He did not reside at the said apartment though but had sublet it to another friend of his. However, he did not know the name of this friend of his. Equally he had no further details of this friend of his; and

(h) DW2 did not testify that he was the respondent's boss. He also did not testify that he used to meet the respondent at the said premises for the

respondent to pass to him the sums he had collected from DW2's borrowers. Equally he denied that he gave RM50 to the respondent for the respondent to apply for the access card to gain entry into the said *pangsapuri*. DW2 also did not say anything about the Honda Odyssey motorcar or that he was the owner of the said motorcar.

FINDINGS OF THE LEARNED JUDGE AT THE END OF THE DEFENCE CASE

[27] The learned judge found that the respondent had raised a reasonable doubt upon the prosecution's case on account that the respondent was not the tenant nor the occupier of the said premises. The learned judge decided, at pp 26–27 of *Jld* 1, RR, as follows:

> 37. Setelah mendengar, menilai dan menimbangkan keseluruhan keterangan pihak pembelaan, mahkamah memutuskan bahawa apartment 5-3 Pangsapuri Maharani City Tower bukanlah disewa atau dihuni oleh OKT tetapi oleh penyewa sebenar, Tan Boon Chuan sepertimana tenancy Agreement P18 yang juga dihuni oleh SD2 sepertimana yang dinyatakan oleh SP1 di dalam keterangannya di mahkamah dan juga terdapatnya catatan nombor telefon 017-7730431 dan 017-6776390 Ah Long (nephew).
>
> 38. Ini membuktikan bahawa OKT tidak tinggal di apartment tersebut dan apartment tersebut juga boleh diakses oleh orang lain termasuk SD2. Dengan itu segala pertuduhan akan penemuan dadah telah berjaya disangkal oleh pihak pendakwaan.

[28] Premised upon the above, the learned judge ordered the acquittal and discharged of the respondent of charges No 2 to No 7 at the end of the defence's case.

THE APPEAL BEFORE US

[29] The learned deputy public prosecutor raised only one issue ie the learned judge erred in law and in fact when he found that the respondent had raised a reasonable doubt upon the prosecution's case grounded upon the premise that the respondent was not the tenant nor occupier of the said premises.

DECISION

[30] It is apparent that the learned judge did not take into consideration DW2's admission that he had rented the said premises and paid RM800 per month as rentals for the same when the learned judge decided (*memutuskan*) that the said premises was not rented or being occupied by the appellant but by Tan Boon Chuan pursuant to the tenancy agreement, exh P18. Therefore, as

far as the defence is concerned, the said premises was rented by DW2 who had further sublet it to his friend, whose name he did not know or cannot now remember. On the other hand, the respondent claimed that he did not reside at the said premises, but elsewhere and came to the premises only to meet DW2 to pass the sums he had collected to DW2. Hence the only issue is the veracity of the defence's testimony pertaining to the said tenancy and the occupier of the said premises.

[31] In this connection, DW2 testified, at pp 143–144, *Jld* 2, RR, as follows:

Q:	You selalu jumpa dia dengan satu apartment di Muar, apartment itu siapa punya?
A:	Bangunan itu adalah kawan saya punya.
Q:	Apa kaitan kamu dengan apartment itu?
A:	Saya yang keluarkan duit menyewa untuk orang lain duduk.
Q:	You ada duduk sana?
A:	Tidak.
Q:	Berapa banyak sewa you bayar untuk apartment ini?
A:	RM800.00
Q:	Siapa orang yang kamu sewa apartment itu?
A:	Saya sewa kepada kawan saya tetapi nama saya tak ingat.

[32] In my view, DW2's aforesaid testimony is unbelievably incredible. He had rented the said premises since the middle of year 2011 and paid RM800 per month but did not occupy the said premises. Instead he had allowed his friend to stay in the said premises. In the next breath he said that he had sublet the premises to his friend but incredibly or perhaps conveniently could not remember his friend's name. There were no details regarding the amount of rentals paid to him by his friend nor the commencement and duration of the subtenancy. Given that entry into the *pangsapuri* by owners, tenants or occupiers alike is by way of an access card as indicated in PW8's testimony and by the respondent's application for an access card, there is no evidence from DW2 that he had given an access card to his friend nor evidence that his friend did in fact apply for an access card. DW2 had also failed to explain his rather strange behaviour on why he had rented the said premises but did not reside therein. Instead he created another subtenancy with his friend. These are pertinent issues which baffled our minds. Equally it has also seriously eroded DW2's credit worthiness and the veracity of his testimony.

[33] Additionally, it is apparent that DW2 and the respondent had contradicted each other on core issues of the defence mounted by the

respondent. DW2 did not testify that he was the respondent's boss, whereas the respondent was very emphatic that DW2 was his boss. DW2 did not testify that he met the respondent at the said premises for the respondent to pass to him the sums he had collected from DW2's borrowers, whereas the respondent testified that was the purpose of the meetings. In fact DW2 did not explain the purpose of his frequent meetings with the respondent at the said premises. DW2 denied that he gave RM50 to the respondent for the respondent to apply for an access card to gain entry into the said *pangsapuri*, whereas the respondent was very emphatic that DW2 gave the said sum to him for the said purpose. DW2 did not mention anything about the Honda Odyssey motorcar that was parked within the compound of the *pangsapuri* nor acknowledged ownership of the same, whereas the respondent claimed that he was arrested inside the said motorcar and that the said motorcar belonged to DW2 and was later seized by the police at Johor Bharu.

[34] Of further interest is the respondent's testimony that he would come to the said premises only if called upon by DW2 and only if DW2 was in the said premises. However, DW2 made no reference of this arrangement at all.

[35] It is also worthy to note that the respondent's core defence was not raised nor put to the relevant prosecution witnesses, in particular PW5 and PW6, members of the raiding team and PW7, the investigation officer, during the stage of the prosecution's case. The following were only raised for the first time at the defence's stage:

(a) the presence and role played by DW2;

(b) that DW2 had rented the said premises from his friend, the owner of the said premises at RM800 per month;

(c) that DW2 then sublet the said premises to his friend whose name he could not now remember;

(d) that the respondent worked as a debt collector for DW2;

(e) that DW2 was the respondent's boss;

(f) that the respondent stayed elsewhere and would go to the said premises to meet DW2 in order to pass the sums the respondent had collected from DW2's borrowers;

(g) that the respondent would come to the said premises only if called upon by DW2 and only if DW2 was in the said premises;

(h) that DW2 gave the respondent RM50 to apply for the access card from the *pangsapuri*'s management to have access into the *pangsapuri*;

(i) that DW2 gave him the key to the said premises to gain entry;

(j) that on the night of the incident the respondent had gone up to the said premises to meet DW2 to pass the sums he had collected to DW2 but DW2 was not in;

(k) the presence of the Honda Odyssey motorcar belonging to DW2 within the compound of the *pangsapuri*; and

(l) that the respondent was arrested inside the said Honda Odyssey motorcar while in the midst of leaving the said *pangsapuri*.

[36] Those were the respondent's core defence. The respondent's failure to put forth its defence at the earliest possible stage or opportunity had occasioned a break of the rule of essential justice, as apart from springing surprises, it also leaves no room for rebuttal, denial, explaination or confirmation by the prosecution witnesses, particularly PW5, PW6 and PW7. Being the crux of the respondent's defence, it is only to be expected that these issues should feature prominently in the cross examination of the aforesaid witnesses. Apart from his own testimony, the respondent's defence can also be ascertained from the line of cross-examination of the prosecution witnesses. It is equally incumbent upon the defence to put forth its case at the earliest possible stage. As it were, the evidence posited by the defence through the testimonies of the respondent and DW2 has no chance of being tested and corroborated. The prosecution were denied of the opportunity to check or verify the truthfulness or falsity of the version of the facts alluded by the respondent and his witness – see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 at p 218.

[37] Meanwhile in *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236, the Federal Court laid down the obvious:

> ... he is required to do to enable the plaintiff or prosecution to bring out evidence to disprove what the defence intends to adduce. If the defence does not in an way indicate by cross examination of those facts, those statements made by the plaintiff's or prosecution witnesses must be accepted true ...

Additionally, in *Timhar Jimdani Ong & Anor v Public Prosecutor* [2010] 1 MLJ 775; [2010] 3 CLJ 938, the court postulates the following, at para 18:

> ... Essential justice required that the defence should be put during the cross examination of any witness that part of the evidence which is disputed. An early exposition of the defence, even at the prosecution's stage has become an essential feature in the adversarial system of criminal trials in the common law jurisdiction ...

[38] In such event it only proper to rule that such failure by the respondent to put forth his case at the earliest possible stage would render the same to be likened as an afterthought or a recent invention, incapable of being accorded the due weight it deserves – see also *Public Prosecutor v Lin Lian Chen* [1992]

2 MLJ 561. There has been a belated disclosure of the defence which suggested concoction. This is elementary. A

[39] Having regard to all the facts and circumstances thereunder, there was ample evidence to indicate that the respondent was occupying the said premises and was in full control, management and have exclusive use and access of the premises. B

[40] In this connection, the evidence is uncontroverted that the key to the premises was found in the sling bag, slung over the respondent's shoulders as testified by PW5. There is no reason to disbelieve PW5's testimony relating to the seizure of the said key. Equally, the respondent did not seriously challenge the seizure of the said key in the manner as testified by PW5. C

[41] The access card to the *pangsapuri* was found by PW7, the investigating officer, in the said premises. Again, the respondent mounted no challenge in respect of its recovery. D

[42] PW8 (Puan Khoo Wei Ha) was the then secretary of the joint management committee of the *pangsapuri*. She testified that entry of motor vehicles into the compound of the *pangsapuri* was through an auto gate where it could only be activated vide an access card. Her testimony implicating the respondent at pp 102–103 of *Jld* 2, RR, evinced the following: E

Court:	Siapa issue akses card?	F
A:	Pejabat.	
Q:	Puan ada keluarkan?	
A:	Ada.	
Q:	Kalau nak keluarkan apa prosedur?	G
A:	*Itu orang kena pergi ke pejabat, beritahu mana unit yang dia tinggal kemudian kena bayar RM150.00.*	
Q:	Lepas bayar?	
A:	Dia akan diberi satu kad.	H
Q:	Pada 1 October 2011 puan ada kerja kat ofis pada hari itu?	
A:	Ada.	
Q:	Pada hari itu ada tak puan keluarkan akses card?	I
A:	Ada.	
Q:	Ingat tak keluarkan kepada siapa?	
A:	Tak ingat.	

Q: Tadi puan cakap orang itu akan bayar RM150.00. Ada puan keluarkan resit tak?

A: Ya, ada.

Q: Kalau saya rujuk kepada puan satu resit puan boleh cam tak?

A: Ini Yap Kim Wang. RM150.00 sahaja untuk AG card.

Q: Apa itu AG card?

A: Auto gate card.

Q: Ini resit siapa sign?

A: Saya.

(Emphasis added.)

[43] The said receipt bearing No 3280 was tendered in court and marked as exh P35. She could no longer identify the said Yap Kim Wang but said that he is a male Chinese. The access card looks like P39. Based on the said resit the respondent's unit is unit 5-3.

[44] The fact that the respondent had applied for the access card was not disputed by the respondent. The significance of PW8's evidence goes to show that the respondent was occupying the said premises when he applied for the access card on account that 'itu orang kena pergi pejabat, beritahu mana unit yang dia tinggal kemudian kena bayar RM150'. His application of the said access card is grounded verily upon his occupation of the said premises.

[45] The respondent must have done so out of his own volition since DW2 had denied that he gave RM50 to the respondent to apply for the access card. This was the respondent's feeble attempt to show that he did not rent nor occupy the said premises but was only a runner to DW2 and everything was done at the behest of DW2 when in fact it was not. The significance of PW8's testimony also showed that the respondent had lied when he said that he paid only RM50 for the access card. PW8's testimony and the receipt, exh P35, showed that he paid RM150 for the access card.

[46] PW7 also produced the statement of the security guard employed by the *pangsapuri*'s management at the material time, one Sabar Menanti bin Beran, recorded under s 112 of the Criminal Procedure Code. The statement was recorded on 15 October 2011, about four days after the respondent's arrest. Sabar Menanti bin Beran died on 29 March 2013, before the commencement of the trial, evinced by his death certificate, exh P33 at p 285 of *Jld* 4, RR. The said statement was properly produced and admitted in evidence under s 32(1)(i) of the Evidence Act 1950 and marked as exh P34, evinced at pp 286–288 of *Jld* 4, RR.

[47] Given that the said statement has little weightage on account that the maker is no longer around to be cross-examined, nevertheless it must be evaluated by the trial judge for what it is worth although it may not be, strictly speaking, evidence, regard being had to the surrounding circumstances and other available evidence that may corroborate the statement. Additionally, it has been admitted in evidence. However, it appeared that the learned judge had totally ignored this statement.

[48] Sabar Menanti's statement is a short statement. Nevertheless its essence is reproduced below for purposes of clarity:

S: Boleh kamu ceritakan mengenai tugas kamu.

J: Tugas saya mengawal keselamatan di kawasan pangsapuri City Tower Muar, Johor. Setiap individu yang hendak masuk ke dalam kawasan ini mereka kena ada pas (auto gate). Dengan ada pas itu mereka baru boleh masuk ke kawasan tersebut kerana ada palang yang menghalang kenderaan pada pintu masuk.

S: Bagaimana pula individu yang berjalan kaki?

J: Saya akan tahan mereka yang masuk secara jalan kaki, saya minta pengenalan diri mereka dan buat catatan pada buku saya.

S: Apakah tugas kamu pada 11 October 2011?

J: Tugas saya mengawal keselamatan di kawasan pangsapuri pada jam 7.00 petang sehingga 7.00 pagi.

S: Adakah kamu kenal gambar ini (saya tunjukkan gambar pada folio D). *(In respect of the same, PW7 testified that he showed the respondent's photographs marked P-32(1 to 5) to the witness for the said purpose of identification).*

J: *Ya saya kenal. Dia tinggal di 5-3 Pangsapuri City Tower Muar, Johor.*

S: Macam mana kamu tahu dia tinggal di situ?

J: Dia orang baru, baru pindah, jadi setiap individu muka baru di kawasan ini saya akan kenal. Dari situ saya akan tanya dia tinggal di mana.

S: Sudah berapa lama dia tinggal di kawasan itu?

J: Sudah lebih kurang dua bulan.

(Emphasis added.)

[49] There was ample evidence to corroborate Sabar Menanti's statement that the respondent occupied (*tinggal*) premises No 5-3 of the said *pangsapuri*. The key with the tag carrying the number 5-3 was found inside the respondent's sling bag. The respondent led PW5 and his team to premises No

5-3 of the *pangsapuri*. PW7 was able to open the door of premises No 5-3 using the said key.

[50] The auto gate access card was recovered from premises No 5-3. PW8 confirmed that there was an auto gate leading to the *pangsapuri* and access into the compound (*kawasan*) of the *pangsapuri* is through the auto gate that could only be activated by using the access card. PW8 also confirmed that the respondent had applied for an access card and she had issued an auto gate access card to the respondent. The respondent equally admitted that he had applied for an access card.

[51] The pair of jeans and sandals found inside premises No 5-3 fitted nicely on the person of the respondent despite of the respondent's protestations that the same were too big for him.

[52] The statement of the late Sabar Menanti bin Beran that the respondent was residing at premises No 5–3 was amply corroborated in all material particulars as indicated in the aforesaid paragraphs.

[53] The falsity of the respondent's defence is most discernible when he said that he would only come to the said premises upon being notified by DW2 and only if DW2 was in the said premises. However, on the day of the incident the respondent had proceeded to go to the said premises to pass the sums he had collected to DW2 but failed to meet DW2 because DW2 did not come or was not in the premises. Clearly he had breached his own rule. Additionally PW5 did not find any money that was intended to be given to DW2. He only recovered RM250 from the purse inside the sling bag. Nevertheless the respondent did not testify that the said amount was the sum that he had intended to pass to DW2. In the event, the defence as contrived upon these issues is merely a red-herring devoid of any credit.

[54] For all the reasons given, I have no hesitation to find that the respondent was indeed the occupier of the said premises. He had full control, management and exclusive use and access of the premises. The discovery of the drugs and poisons in the unlocked room inside the premises which was under the control, management and exclusive use of the respondent verily fastened the respondent with the possession of the said drugs and poisons.

[55] The presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952, invoked against the respondent in respect of the second charge remains unrebutted on account of the respondent's failure to negate the same.

[56] My learned brother, Justice Mohtarudin bin Baki had gone through this judgment in draft. He has expressed his agreement with the views and findings

enumerated herein. However, my brother, Justice Dr Haji Hamid Sultan bin Abu Backer has come up with his own dissenting judgment.

[57] We therefore, by a majority verdict, allow the appellant's appeal in respect of the orders of acquittal and discharged of charges No 2 to No 7 and find the respondent guilty and convicted of all the aforesaid charges. The orders of the High Court acquitting and discharging the respondent of the said charges are henceforth set aside.

[58] In mitigation, the respondent pleaded that he has now repented and promised that he will not dabble in substance abuse anymore. He is now 28 years old and has a 60 year old mother and a 65 year old father and verily wish to return to them. He has been in remand since 11 October 2011 (date of his arrest) and is currently serving a ten year prison term and ten strokes of the rattan on account of his conviction in respect of the first charge. Finally he prayed for minimum prison terms and the said terms to run concurrently with the prison term he is currently serving.

[59] The learned DPP argued for a deterrent sentence on account of the severity and prevalence of the offences committed by the respondent.

[60] We were in full agreement with the learned DPP. We were all on common ground that the offences committed by the respondent were indeed serious and prevalent. Much has been done by the powers that-be to stem the scourge but nevertheless, there is no sign of its abatement. The position is best stated by His Lordship, Mohd Zawawi Salleh JCA, in *Public Prosecutor v Ling Leh Hoe* [2015] MLJU 1006; [2015] 4 CLJ 869, in the following terms:

> ... abuse of dangerous drugs is a scourge to our society leading to many spinoff incidences of criminal behaviour. It is a purveyor of death. Therefore, one could hardly deny that drug offenders are a threat to our society from which we must be protected, sometimes by means of lengthy custodial sentence.

[61] Having considered all the relevant factors and circumstances, we opined that public interest must reigned supreme over the respondent's. Hence the respondent is sentenced as follows:

(a) second charge – he is sentenced to suffer the death penalty under s 39B(2) of the DDA 1952.

(b) third charge – he is sentenced to two years imprisonment to run with effect from the date of his arrest (11 October 2011).

A

(c) fourth charge – he is sentenced to 15 years imprisonment to run with effect from the date of his arrest and ten strokes of the rattan under s 39A(2) of the DDA 1952.

B

(d) fifth charge – he is sentenced to two years imprisonment to run with effect from the date of his arrest.

(e) sixth charge – he is sentenced to two years imprisonment to run with effect from the date of his arrest.

C

(f) seventh charge – he is sentenced to two years imprisonment to run with effect from the date of his arrest.

Appellant's appeal allowed in respect of orders of acquittal and discharge of second and seventh charges and respondent found guilty and convicted for all charges; orders of High Court set aside.

D

Reported by Afiq Mohamad

E

F

G

H

I